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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

BRIEF FOR RESPONDENT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

G. BOWDOIN CRAIGHILL,
FRANK H. MYERS,
Attorneys for Respondent.

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BRIEF FOR RESPONDENT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

Short Statement.

This case arises under Sections 21 and 33, hereinafter quoted, of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424), made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600).

The Deputy Commissioner, R. J. Hoage, after hearing the evidence and finding the facts, rejected petitioner em-

ployee's claim for compensation (R. 9-10) and his decision was sustained by the Supreme Court of the District of Columbia (R. 70) and by the United States Court of Appeals for the District of Columbia (R. 74-78), under circumstances which may be briefly stated, in chronological sequence, as follows:

December 15, 1928—Petitioner, Isaac Chapman, hereinafter called the "employee," while working as a helper on a truck of Palais Royal, Inc., hereinafter called the "employer," was injured when the truck collided with a street car of the Washington Railway and Electric Company, in the District of Columbia (R. 2, 9). The bones of the toes of the employee's right foot were fractured (R 42), the principal injury being to the bone of the "big toe" (R. 40), which healed satisfactorily (R. 67).

June 10, 1929—The employee gave written notice to the Deputy Commissioner that he elected to sue the third party, the Railway Company, for damages and, if the compensation to which he was entitled under the Compensation Act exceeded the amount recovered from the third party, he made claim to the difference, as provided by the Act (R. 2, 9).

July 18, 1929—The employee filed suit in the Supreme Court of the District of Columbia against the Railway Company and thereafter obtained a verdict in his favor for $3,000, but on May 8, 1933, the judgment thereon was reversed by the United States Court of Appeals for the District of Columbia, and the cause was remanded to the lower Court "for further proceedings" (62 App. D. C. 140, 65 F. (2d) 496). Application to this Court for writ of certiorari was denied on October 9, 1933 (290 U. S. 661).

March 1, 1934—Without attempting any further proceedings in court against the third party, the employee ap-

plied to the Deputy Commissioner for compensation (R. 2, 5, 9-10).

April 26, 1934—At a hearing on the application before the Deputy Commissioner, counsel for the Indemnity Insurance Company, hereinafter called the "insurance carrier," which insured the compensation liability of the employer, immediately protested that the Commissioner was without jurisdiction because "the claimant has not pursued and exhausted his third-party remedy"; that the case had been remanded for a further trial and if the employee "does not pursue his third party remedy to its completion, he irrevocably prejudices the rights of the employer to a subrogation of the action," because the statute of limitations "precludes us from pursuing our rights" (R. 14). After counsel for the insurance carrier further elaborated his position, counsel for the employee stated: "I must say that in part *I am forced to agree with you*" (R. 16). The Deputy Commissioner then continued the case indefinitely, saying: "Whenever you advise me that the case is perfectly clear of court procedure and make a request for a further hearing, I will be glad to hear it" (R. 16).

May 3, 1934—In his action against the Railway Company the employee then filed a motion for leave to proceed further therein, without payment of costs, stating that under the decision of the Court of Appeals he "would be stopped from obtaining a judgment in his favor in any future proceedings," but that upon applying for compensation, the Deputy Commissioner held that he had not exhausted his remedy at law and he prayed permission to proceed in court "for the purpose of having this cause determined as a matter of record" (R. 7-8).

May 9, 1934—The above motion was denied by the court "and plaintiff (employee) thereupon, through his attorneys

of record, *by præcipe duly filed in said cause, discontinued said action''* against the Railway Company (R. 70).

June 8, 1934—At a further hearing before the Deputy Commissioner, counsel for the insurance carrier renewed his objection that the employee had not exhausted his remedy against the third party and, the statute of limitations having intervened, the employer's subrogation rights had been prejudiced, especially as the suit against the third party had not been dismissed by the court, but by the voluntary action of the employee's attorneys (R. 20-21). The Deputy Commissioner then received testimony as to the extent of the injuries, principally a fracture of the bone of the ''big toe'' on the right foot (R. 40), which healed (R. 67). The employee ~~received~~ earned $18 per week at the time of the injury (R. 19) and $20 per week at the time of the compensation hearing (R. 18).

June 27, 1934—The Deputy Commissioner filed his findings of fact and rejected the claim for compensation, saying:

> ''It is found that the claimant by his action in not pursuing his remedy against the third party to its completion within the statutory limit has thereby prejudiced the rights of and precluded the employer from taking such action as is provided in the compensation law'' (R. 9-10).

July 11, 1934—Under Section 21 of the Compensation Law, providing that ''if not in accordance *with law*, a compensation order may be suspended or set aside'' through injunction proceedings, mandatory or otherwise, Chapman filed this bill in equity in the Supreme Court of the District of Columbia, to set aside the above compensation order and to require the Deputy Commissioner to award compensation (R. 1-4).

July 27, 1934—Deputy Commissioner filed a motion to dismiss the bill (R. 67-68).

August 6, 1934—Insurance carrier obtained leave to intervene and on September 7, 1934, filed a motion to dismiss bill (R. 68-69).

November 19, 1934—Final decree of Supreme Court of the District of Columbia dismissing bill (R. 70).

May 13, 1935—Opinion rendered by United States Court of Appeals for the District of Columbia, affirming above decree and holding:

> "The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, with the intervention of limitations, bars his right to recover compensation under the statute." (R. 74-78.)

Statute Involved.

Section 33 of the Compensation Act of March 4, 1927 (44 Stat. 1424), made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600), provides:

> "Compensation for Injuries Where Third Persons Are Liable.
>
> Sec. 33 (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, *he may elect*, by giving notice to the deputy commissioner in such manner as the commission may provide, *to receive such compensation or to recover damages against such third person.*
>
> (b) Acceptance of such compensation *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person*, whether or not the person

entitled to compensation has notified the deputy commissioner of his election.

(c) * * * (not involved).

(d) *Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.*

(e) Any amount received by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative *elects to recover damages against such third person* and notifies the commission of his election and *institutes proceedings* within the period prescribed in section 13 (one year), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the commission deter-

mines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) *only if such compromise is made with his written approval.*

(h) (Not involved)."

(Italics supplied.)

Section 21 of the same Compensation Act, provides:

"Review of Compensation Orders.

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District)."

Section 35 of the Compensation Act provides for the substitution of the insurance carrier for the employer.

Question Involved.

Were the two lower courts right in holding that the Deputy Commissioner's order of June 27, 1934 (R. 9-10), was "in accordance with law," under Sections 21 and 33

of above Compensation Act, such order having *rejected* the employee's claim for compensation because the employee, after electing to sue and after suing the third party for damages, *voluntarily discontinued his suit*, without the consent of the employer and over the protest of the insurance carrier, *after* the statute of limitations barred the institution of a new action against the third party, thereby prejudicing the employer's right of subrogation?

ARGUMENT.

1. The findings of the Deputy Commissioner, supported by evidence, are final and conclusive.

It is well settled that the findings of fact of the Deputy Commissioner, when supported by substantial evidence, are final and conclusive and will not be disturbed by the Courts.

Crowell v. *Benson*, 285 U. S. 22;
Voehl v. *Indemnity Ins. Co.*, 288 U. S. 162.

In the present case, every fact found by the Deputy Commissioner in his compensation order rejecting the claim (R. 9-10) was fully supported by ample evidence, which has not been and can not be controverted, as shown by the foregoing statement, with references to the record. The Deputy Commissioner thereupon made a definite finding that the employer's right of subrogation had been prejudiced by the employee's action in first electing to sue the third party and then dismissing his action without the consent of the employer after the statute of limitations intervened.

In the *Voehl* case, 288 U. S. 162, this same insurance carrier contended that the Deputy Commissioner's findings with respect to "jurisdictional facts," or facts which constituted a conclusion from other proved facts, were not final and could be reviewed, reversed or modified by the courts, but this Court overruled that contention.

Therefore, the Deputy Commissioner's definite finding in the present case that the employee's action, in voluntarily dismissing his suit against the third party, *prejudiced* the employer's right of subrogation, is not subject to review by the courts, but must be treated as final and conclusive.

The employee's voluntary dismissal of his action against the third party constituted a compromise and under paragraph (g), Section 33 of the Act, the employer was liable for compensation "only if such compromise is made with his written approval." In the present case there was no such written approval and, in fact, the insurance carrier, *before* the third party's action was discontinued, protested and notified the employee that the third party remedy should be pursued to a final decision (R. 14-15).

As matter of law, therefore, the Deputy Commissioner was right in rejecting the claim for compensation because the employee violated the provisions of the Compensation Act and prejudiced the employer's rights.

2. At the outset, employee's election to sue third party deprived employer of a substantial right of subrogation.

The Compensation Law contemplates that industry shall bear the burden of the cost of injuries sustained by employees in the course of their employment. On the other hand, the statute recognizes the principle that the real wrongdoer shall pay the penalty for his negligence in causing injury and provides that, when an employee is injured through the negligence of a third party, the employee may elect to sue the third party or accept compensation from his employer. If the employee elects to accept compensation, the statute gives the right of subrogation to the employer who may then sue the wrongdoer.

Counsel for employee earnestly claim that a reading of the opinion of the United States Court of Appeals for the

District of Columbia in the employee's action against the third party (62 App. D. C. 140) (which forms no part of the record in the present case), will show that the employer's right of subrogation against the third party was valueless and therefore not a "substantial right."

The damage to the employer's right of subrogation, however, was done long before the Court of Appeals rendered its decision. Under paragraph (b) of Section 33 of the Compensation Act, the employee's acceptance of compensation *automatically operated as an assignment* to the employer of the employee's cause of action against the third party. If the employee had elected to accept compensation the employer would have been entitled *then* to engage its own counsel, to make its own exhaustive investigation of the facts, to secure the attendance of all favorable witnesses and to prosecute the case against the third party, as vigorously as possible, to a conclusion.

When the employee, at the outset, on June 10, 1929, filed a written notice of his election to pursue the remedy against the third party, *then* he deprived the employer and insurance carrier of the valuable and substantial right of subrogation. After making the election to sue the third party, if the employee pursued his remedy in a half-hearted way, he did so at his own risk. If the employee failed to secure the attendance of witnesses who might have helped to prove that the third party was negligent, the employee, not the employer, should suffer the penalty for his neglect.

That the employee did not prosecute his case vigorously to a conclusion is illustrated by the motion which he made to proceed in the third party action without payment of costs, such motion not having been made until the insurance carrier insisted at the hearing on April 26, 1934, that he should exhaust his remedy against the third party (R. 14-15). In this motion the employee stated to the court that, under the decision of the Court of Appeals, he "would be

stopped from obtaining a judgment in his favor," but, in order to be in a position to obtain compensation, he filed the motion "for the purpose of having this cause determined as a matter of record" (R. 7-8). It is apparent that this was not a *bone fide* effort to prosecute his case to a conclusion, but a half-hearted gesture to comply with the letter but not the spirit of the compensation law.

The court very properly refused to be a party to any such scheme and denied the motion. Then the employee, without the consent of his employer and after the employer had been deprived of the right to protect itself, a suit by the employer being then barred by the statute of limitations, voluntarily caused the third party action to be discontinued (R. 70).

3. The voluntary discontinuance by the employee of his action against the third party does not afford a basis for determining the amount of the insurance carrier's liability for deficiency compensation.

After electing to proceed against the third party, the employee became entitled, under paragraph (f), Section 33, of the Act, to an award for any deficiency between the amount recovered from the third party and full compensation due under the Act.

Having elected to sue, the employee left it to the courts to determine the amount to be recovered from the third party. After filing suit, the employee was given no right to decide for himself that his recovery should be zero and, by voluntarily dismissing his suit, demand full compensation, the employer's right of subrogation having been destroyed in the meantime by the statute of limitations.

Paragraph (g), Section 33, distinctly provides that the employee may not compromise his case against the third party without the written approval of the employer, the statute thus recognizing the employer's right to have the

case against the wrongdoer prosecuted to a conclusion, either by the employee in his own right or by the employer under the right of subrogation given by paragraph (b) of Section 33.

The employee could not circumvent the statute by dismissing his suit and thus furnish a basis for computing the deficiency for which the employer or insurance carrier would be liable. Such dismissal constituted, in effect, a compromise which he was not permitted to make without his employer's written approval, which he did not obtain, after being notified that the insurance carrier insisted upon his going forward with "further proceedings" in the case against the third party.

Counsel for the employee contend, and the learned Justice who wrote the dissenting opinion in the Court of Appeals suggested, that such "further proceedings" would have been "bootless" or futile. Under the decision of this Court, however, in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, after the plaintiff obtained a verdict in his favor, as the employee did in the present case, neither the trial court nor the appellate court had power to enter a judgment in favor of the defendant, but under the Seventh Amendment to the Constitution, the employee plaintiff had an absolute right to a new trial, on the issues of fact, before a jury. At such new trial, evidence not offered at the first trial might have been introduced to prove that the Street Railway Company was negligent after seeing Chapman in a position of peril on the track, even though Chapman may have been negligent in the first instance.

When Chapman elected to sue the third party, he must have decided that he had a good cause of action, and, thereafter, the Compensation Act gave him no right to change his mind and decide for himself that he did not have a good cause of action. Chapman had no right to take the law into

his own hands and make a decision, which the courts could not make without the aid of a jury. This is exactly what Chapman undertook to do, when *he* decided that he could not recover from the Railway Company and, therefore, voluntarily dismissed his suit against the Railway Company. By such act he deprived the employer and insurance carrier of a valuable right of subrogation and forestalled any chance which they might have had to recover from the Railway Company and have the amount of such recovery credited on the compensation payable to Chapman. The amount of such recovery, as Chapman no doubt hoped when he elected to sue the third party, might have exceeded the compensation payable under the Act, in which event the employer and insurance carrier would have been under no obligation to make any payment whatever.

4. **Having made an election to sue the third party, the employee was estopped from claiming compensation until after his action against the third party had been finally determined.**

As above shown, either a determination by a court and jury of the amount recoverable from the third party, or a compromise with the written approval of the employer, was necessary, as a condition precedent, to fix the basis for a computation of the deficiency compensation, if any, due the employee.

After electing to sue the third party, the employee, by his voluntary conduct in dismissing the action, prevented a final determination of the liability of the wrongdoer and made it impossible to effect a favorable compromise. The election thus made by the employee and his voluntary conduct in dismissing his suit, having prejudiced the employer's right of subrogation, the employee is *estopped* from claiming compensation from the employer, or its insurance carrier.

In *Dahn* v. *Davis,* 258 U. S. 421, a railway mail postal clerk, who was injured in a railroad wreck, had an option to accept compensation from the Government under the Federal Employees' Compensation Act (39 Stat. 742), or sue the Government, through the Director General of Railroads, under the Federal Control Act (40 Stat. 451), for damages resulting from the negligent operation of the train. This Court held that the employee, having *elected* to accept compensation, was barred from prosecuting an action for negligence against the Director General of Railroads.

It is elementary law that where a party has two remedies, he must elect to pursue one or the other. If, while pursuing one remedy, the other remedy becomes barred by the statute of limitations, he loses the right to pursue the alternative remedy.

Willard v. *Wood,* 164 U. S. 502.

Authorities.

A. Petitioner's counsel have cited only two cases in support of their main contention and both of them may be distinguished from the case at bar.

During the past thirty years Workmen's Compensation Laws have been enacted in nearly all of the States of the Union and also by Congress, covering injuries to Federal employees, longshoremen and harbor workers and employees in Alaska, Hawaii, Philippines, Porto Rico and the District of Columbia, and there have been many decisions construing these laws, many of which provide for an election by the employee to accept compensation or sue the third party causing his injury. A digest of such laws will be found in Bulletins Nos. 423, December, 1926, and 485, November, 1929, Bureau of Labor Statistics, Department of Labor.

Notwithstanding many decisions on the subject, counsel for petitioner, although citing several cases relating to general principles, have mentioned, in their brief, only two decisions in support of their main contention, namely, *Van Deusen* v. *Hoage,* not reported, in the Supreme Court of the District of Columbia, and *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. (2d) 616, both of which may be distinguished from the case at bar.

In *Van Deusen* v. *Hoage,* Equity No. 56,030, Supreme Court D. C., not reported, an injured employee elected to sue a third party, but later decided not to do so, because in a suit brought by his wife, who was injured in the same accident, it was discovered that the third party was judgment-proof. The injured employee then claimed compensation, well *within the statutory period of three years,* but the insurance carrier contended that its right of subrogation had been prejudiced because the third party had left the District of Columbia. Judge Adkins filed an opinion in the case to the effect that no substantial right of subrogation had been prejudiced and the employee was entitled to compensation. The difference in the facts is apparent. Furthermore, with due deference to Judge Adkins, it is respectfully submitted that he erred in undertaking to determine, upon the record before him, that the employer's right of subrogation was not "substantial." That could only be determined in an action prosecuted by the employee against the third party to a final conclusion.

The only other case, upon which petitioner's counsel relies in support of his main contention is that of *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. (2d) 616, which arose under the Longshoremen's Act. There the widow of an employee, who was killed, was told by an insurance carrier that she could elect to sue the Steamship Company and later, if she chose to do so, she could dis-

continue such action and compensation would be paid to her. The accident occurred on October 13, 1932, and the widow elected on December 7, 1932, to sue the third party, but due to her financial necessities, on April 6, 1933, only a few months after the accident, she notified the compensation commissioner and insurance carrier that she intended to discontinue her action and claim compensation. The insurance carrier was represented at the motion to discontinue the third party action and merely stated that it did not consent to the discontinuance. The commissioner awarded compensation and suit was filed to set aside the award.

The Circuit Court of Appeals for the Second Circuit held that

> "*in the absence of such delay as will prevent the employer or its carrier from effectively availing themselves of their rights against the third person by way of subrogation,* would there seem to be adequate reason for depriving a person entitled to compensation of the right to discontinue her action and seek compensation under the statute.
>
> • • • • • • •
>
> In our opinion some prejudice to the employer or the carrier from the discontinuance of the action ought to be shown in order to render the initial election unalterable. Here there was none. When the action was discontinued, *the statute of limitations had long to run,* so that the employer, as soon as the widow determined to proceed under the Compensation Act, became subrogated to her rights against the Royal Netherlands Steamship Company by reason of section 33 (b) of that Act, and *had plenty of time to bring the action.*" (Italics supplied.)

The court further held that there was no final election by the widow because she had been misled by the insur-

ance carrier, which had told her that if she would sue the third party she could discontinue that action later and obtain compensation.

Thus, in the *Lowe* case, the court laid much stress on the fact that the employer's right of subrogation had not been prejudiced because the third party action was discontinued only a few months after the accident and the statute of limitations had not intervened to bar action by the employer against the third party. In the present case, the injury occurred on December 15, 1928, and the third party action was discontinued, over the insurance carrier's protest, about *five years and five months'* later, May 9, 1934, after the three-year statute of limitations, of which the courts take judicial notice, barred action by the employer against the third party under the automatic assignment in paragraph (b), Section 33, of the Compensation Act.

B. Many Cases Support Position of Insurance Carrier.

State Statutes.

The following workmen's compensation statutes have been construed to mean that an injured employee may elect to claim compensation under the act or sue the third party for damages, but, where an election has been made to pursue one of the two alternative remedies, thereafter the employee is absolutely barred from pursuing the other remedy, until the remedy first selected has been exhausted.

Delaware, Sec. 131 of Compensation Act, Chapter 233, Vol. 29, Laws of Delaware;

Indiana, Sec. 13 of Compensation Act, Acts of 1915, p. 392, Sec. 80201, Burns' Supp. 1918;

Maryland, Sec. 58, Article 101, Maryland, modified by Chapter 456, Acts of 1920, so as to give employee right to sue third party, if employer fails to do so within two months of award of compensation;

Massachusetts, Sec. 15, Chapter 152 of General Laws;
Michigan, Sec. 15, Part 3, of Michigan Workmen's Compensation Law, (Sec. 5468, 2 Comp. Laws, 1915);
New York, Sec. 29, New York Compensation Law;
Oklahoma, Sec. 7302, Comp. Stat. 1921;
Texas, Art. 8307, Sec. 6a, Revised Statutes of 1925;
Utah, Sec. 3133, Compiled Laws of Utah of 1917, amended by Chap. 67, Laws of 1921;
Wisconsin, Sec. 2394-25, Stats. 1921; Sec. 102.29 (2), Stats. 1927;
England, Section 6 of English Compensation Act of 1906 (6 Edw. 7, c. 58).

The effect of an employee's election to sue the third party for damages as a bar to a subsequent claim for compensation from the employer, is illustrated by many cases in many different jurisdictions.

State Decisions.

New York.

Section 29 of the New York Compensation Law is quite similar to Section 33 of the Longshoremen's Act above quoted, in that an award of compensation constitutes an assignment of the employee's cause of action to the person liable for the payment of the award, and, if election is made by the employee to sue the third party, the employee is entitled only to the deficiency between the recovery and the compensation payable under the Act. A compromise may be effected only with the consent of the party liable for the payment of compensation.

In the present case, the majority opinion of the United States Court of Appeals calls attention to the fact that while Section 33 of the Longshoremen's Act provides that the employee *may* elect to sue the third party, Section 29

of the New York Law provides that the employee *shall* elect either to take compensation or sue the third party. The Court of Appeals then stated in its opinion that the provision in the New York law compelling election furnishes "a remote basis for the extreme holding of the New York courts in interpreting their act," but, it is respectfully submitted that while the Longshoremen's Act provides that the employee "*may*" elect, he is in effect compelled to do so, as the acceptance of compensation constitutes an automatic assignment to his employer of his action against the third party, and, after the election has been made, as in the present case, whether he made the election voluntarily or by compulsion seems to be immaterial.

Construing Section 29 of the New York Compensation Act, the courts of that State have held repeatedly that, after an injured employee has elected to sue the third party, he can not compromise or discontinue such action without the consent of the employer. If he does so, he is not entitled to compensation.

In *McKee* v. *White*, 218 N. Y. S. 215, 218 App. Div. 300 (1926), claimant was injured on September 18, 1922; elected to sue the third party, but the third party action was dismissed on May 14, 1925, for want of prosecution, after the statute of limitations barred institution of a new suit. In an unanimous opinion, reversing an award of compensation, the Appellate Division said:

> "By reason of claimant's election to sue the third party and failure to prosecute the action he brought, the carrier has been deprived of a substantial right, which but for the election it would have had, namely, its right of subrogation to claimant's remedy against the third party.
>
> * * * * * * *
>
> "We think the appellant's rights have been sacrificed and that the claimant is estopped from asserting a claim for compensation against them."

This opinion was unanimously affirmed by the Court of Appeals of New York, **Chief Justice Cardozo** concurring (244 N. Y. 610).

In *O'Brien* v. *Knickerbocker Ice Co.,* 211 N. Y. S. 15, 213 App. Div. 464, affirmed in *O'Brien* v. *Lodi,* 246 N. Y. 46 (1927), an employee elected to sue the third party, then compromised and discontinued his third party action, without notice to or consent of his employer, and the New York Court of Appeals held:

> "If he settles, as he has a right to do, his cause of action with the third party without the consent of the insurer, he loses his right to the deficiency. This provision of section 29 is to protect the insurer as to the amount of the deficiency; it has no other purpose.
>
> * * * * * * *
>
> "Therefore, when the claimant in this case settled his action with the defendant (third party) for $300 without the written approval of the Commissioner or the insurer, *he released his right to the deficiency.*"

Chief Justice Cardozo concurred in above opinion. In the case at bar, the discontinuance of the action against the third party amounted to a *compromise*, without the consent of the employer and over the protest of the insurer. Under paragraph (g) of Section 33, therefore, Chapman lost his right to compensation.

In *Kavanaugh* v. *Belden,* 231 App. Div. 412 (1931), an employee was killed on September 8, 1924, by a train and his widow first claimed compensation, then elected to sue, but at the compensation hearing on May 29, 1929, it was found that no summons had ever been served upon the third party and the statutory period for bringing an action had expired. In holding unanimously that the widow was not entitled to compensation, the Court said:

> "Having made election to sue, it was claimant's duty to go on with the action. By her failure to prosecute,

> the carrier has been deprived of a substantial right, which it would have had, but for the election, namely, its right of subrogation to claimant's remedy against the third party."

In *Breital* v. *Hinderstein*, 236 App. Div. 203; 258 N. Y. S. 237 (1932), an infant employee was injured on October 10, 1927, and his time to sue the third party expired on March 13, 1931, one year after he became 21. On October 26, 1927, claimant filed an election to sue the third party, but his attorneys did not bring the case on for trial because claimant did not furnish disbursement money and the third party action was discontinued by stipulation. The Compensation Board awarded compensation on the theory that the discontinuance of the third party action had not prejudiced the employer's right of subrogation, because the statutory time within which suit could be filed against the third party had not expired. The Appellate Division of the Supreme Court, however, held:

> "The theory of the Board is untenable. The confusion arises from the failure to differentiate between an election to take compensation and an election to sue a third party. The claimant cannot elect compensation and also elect to sue a third party. When an election has been made, it is final. *Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377, 37 A. L. R. 826. If the election is to take compensation, an award operates to subrogate the carrier to the claimant's cause of action, if any exists, against the third party. In *O'Brien* v. *Lodi*, 246 N. Y. 46, 157 N. E. 925, it has also been definitely settled that *if an election is made to sue a third party, the sole relief in compensation is an award for deficiency* and there is no assignment of the cause of action to the carrier. *The theory is that the cause of action has been exhausted in order to determine the amount of the deficiency.* If there is no judgment on the merits fixing

the deficiency, there can be no award for deficiency. So unless the carrier has waived its rights in some way, *the consent of the carrier was essential to a discontinuance of the action.*

* * * * * * *

"The question is raised whether a discontinuance is in effect a compromise. I think that *any act whereby the election to sue is not carried to judgment on the merits in order to fix the deficiency is preventive of any award for deficiency unless the carrier has consented or has waived its right in some way.* In this case the carrier did not consent nor did it estop itself to raise a question of prejudice. It was prejudiced and its counsel raised the question at the earliest opportunity. * * *" (Italics ours.)

In the most recent case in New York of *Burmester* v. *DeLucia,* 237 App. Div. 149, 261 N. Y. S. 203 (1932), the accident happened April 13, 1927, and the time expired for suit against the third party on April 13, 1930. Claim for compensation was made April 14, 1927, and, notice of election to sue the third party was thereafter filed on July 28, 1927. By stipulation dated May 10, 1930, the attorneys for defendants (a co-partnership of which the employer was one member) agreed that the third party action be discontinued. The employee made an affidavit attached to the stipulation in which he stated that he had consulted his attorney regarding the liability of the defendants and after due deliberation *had concluded that the case was one of doubtful liability and financial responsibility.* An order was thereafter granted upon this stipulation discontinuing the suit on October 20, 1930, and the employee renewed his claim for compensation. The insurer defended on the ground that the accident did not occur in the course of employment and an award was made. The insurer made a compensation payment under the award but subsequently

repudiated it on the ground that the employee was estopped from claiming compensation due to the discontinuance of the third party suit without its written consent. In reversing the award, the Appellate Division said:

> "The sole question raised on this appeal is that claimant is estopped from asserting any claim for compensation, the argument being that the conduct of the claimant has deprived appellants of their right of subrogation to their prejudice.
>
> "* * * *It appears that the third party action was not discontinued until after the statute of limitations had run against the third party.* * * * By Section 29 of the Workmen's Compensation Law, the *carrier being liable only for deficiency* where a third party action is brought, *the amount of such deficiency could only be determined after the conclusion of the third party action.* No award could be made prior thereto. The carrier was then assured that the action had been discontinued. Upon investigation it discovered that this was not the fact. It then objected that the period of limitation had expired and thereby its rights had been prejudiced. This objection is valid. By the conduct of the claimant he is estopped from asserting liability against such carrier." (Italics ours.)

The Appellate Court of New York reversed this decision (*Burmester* v. *DeLucia*, 263 N. Y. 318 (1934)), on the ground that the carrier, with full knowledge of the defense on which it later sought to rely, had elected at the compensation hearing to interpose an entirely different defense and, having failed on that ground, to then avail itself of the defense which it knew about, but failed to urge, at the hearing. It did not reverse or change the rule followed in the portion of the opinion above quoted.

Massachusetts.

Under Section 15, Chapter 152, General Laws of Massachusetts, an injured "employee may at his option proceed either at law against that person (third party) to recover damages, or against the insurer for compensation under this chapter, but not against both."

In the case of *Coughlin* v. *Royal Indemnity Co.*, 244 Mass. 317, the insurer orally promised an injured employee's attorney that if the injured would not file a claim for compensation, but sue the third party, in the event the employee lost, the insurer would still pay compensation. The employee then sued the third party and the jury returned a verdict for the defendant. The employee then claimed compensation, but the court held, even in this extreme case, that his claim for compensation was barred by his having sued the third party, saying:

> "The employee could not, under the statute, proceed against the wrongdoer and at the same time reserve his rights under the act. He was required to elect which course he would pursue, and by proceeding against the Aberthaw Construction Company, the plaintiff lost his rights under the act against the insurer."

Citing:

Cripps Case, 216 Mass. 586;
Barry v. *Bay State Railway,* 222 Mass. 366;
Labuff v. *Worcester Street Railway,* 231 Mass. 170.

Sciacia's Case, 262 Mass. 531 (1928), appears to be exactly in point. There an employee elected to sue and did sue the third party. When the third party "moved for specifications" and filed interrogatories, the employee discontinued his action and filed a claim for compensation.

The court held that, having elected to sue the third party, the employee's claim for compensation was barred, saying:

> "The fact that the action against Adams was discontinued before proceedings under the statute were begun is not material. *The election was made when the action was brought,* and by this election the employee sought a remedy inconsistent with that given him by the statute."

In *Frish* v. *Wells,* 200 Mass. 429, the court said:

> "It is not, however, the judgment which may be obtained, but the *commencement of a suit* to enforce a co-existing inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding."

In *Tocci's Case,* 269 Mass. 221, in an opinion by Chief Justice Rugg, it was held that where an employee elected to sue and sued a third party, he could not thereafter claim compensation, even though the third party action resulted in a judgment for defendant.

The Massachusetts statute was finally amended by an Act approved May 17, 1929, to the effect that if an employee elected to sue, but then discontinued his action, after notice to the insurer, he could thereafter claim compensation, "provided that upon payment of compensation following such discontinuance *the insurer shall not have lost its right to enforce the liability of such other person,*" but the Massachusetts legislature thus refused to permit an employee to recover compensation when he had sued the third party and had discontinued his suit *after* the employer's or insurer's right of subrogation had been destroyed by the statute of limitations.

Maryland.

Under Sections 36 and 58, Article 101, of the Maryland Code, an injured employee had an option to claim compensation or sue the third party for damages, but he could not pursue both remedies.

Hagerstown v. *Schreiner,* 135 Md. 650.

Under an amendment (Chapter 456 of the Maryland Acts of 1920) to the Compensation Law, where the employer or insurer fails to sue the third party within two months after an award of compensation, the injured employee may do so, but any damages recovered must be applied first to reimburse the employer or insurer for any compensation already paid to the employee.

State v. *Francis,* 151 Md. 147.

Michigan.

Under Section 15, Part 3, of the Michigan Workmen's Compensation Act (Section 5468, 2 Comp. Laws, 1915), the Supreme Court of Michigan has held that "an election (by an employee) to proceed either in a common law action against the third person or for compensation against the employer under the statute *wipes out the other remedy.*"

Smith v. *Port Huron Gas & Electric Co.,* 217 Mich. 519, 522.

Arizona.

Under the Arizona Workmen's Compensation Law, it has been held that where an employee has elected to sue his employer at common law, the remedy adopted becomes exclusive and he can not thereafter claim compensation.

Consolidated Arizona Smelting Co., v. *Ujack,* 15 Ariz. 382.

Utah.

Under Sec. 3133, Compiled Laws of Utah of 1917, amended by Chap. 67, Laws of 1921, an employee is required to assign, to the State insurance fund, or to the employer or insurer, his cause of action against the third party, before he becomes entitled to compensation under the statute, and the Supreme Court of Utah has held that where an employee has sued the third party without making such assignment, he is not entitled to compensation.

Robinson v. *Industrial Commission,* 72 Utah, 203.

Wisconsin.

In *Krell* v. *Industrial Commission,* 203 Wis. 635, it was held that under the Wisconsin Compensation Law, Sec. 102.29 (2), Stats. 1927, the mere *commencement of an action* by the widow of an employee, who had been killed, against the third party, "operated as a waiver by her of any claim for compensation against her husband's employer."

In *McGarvey* v. *Independent Oil Co.,* 156 Wis. 580, the Court reached a similar conclusion.

Texas.

In *Ocean Accident & Guarantee Corp.* v. *Cooper,* 294 S. W. 248 (Texas, 1927), the widow of an employee, who had been killed, sued the third party, but a general demurrer to her petition was sustained and her suit was dismissed. Then she presented claim to her husband's employer for compensation, but the Court of Civil Appeals held that her election to sue the third party barred her right to compensation, saying:

> "The right of subrogation is a valuable right, and can not be destroyed by the voluntary act of the bene-

ficiary without incurring the consequences of an estoppel. It is destroyed when the beneficiary elects to sue the third party and is defeated."

In the earlier case of *Employers Indemnity Co.* v. *Felter*, 277 S. W. 376, attention was called to the fact that the right of subrogation gave the insurer the right to have the third party's liability tried *"in its own way and through its own agents and attorneys"* and the election of the employee to sue the third party deprived the insurer of that right.

England.

Under Section 6 of the Workmen's Compensation Law of England (6 Edw. 7, c. 58), a workman may elect to sue the third party or claim compensation from his employer, but he can not recover both damages and compensation.

20 Halsbury's Laws of England, p. 196.

Where a workman presents a claim for damages against a third party and receives a payment on account thereof, he is barred from claiming compensation from his employer, even though he attempts to reserve the right to make such claim.

L. R. A., 1916-A, p. 101, citing
Page v. *Burtwell*, 2 K. B. 758;
Mulligan v. *Dick*, 41 Scot. L. R. 77;
Murray v. *North British R. Co.*, 41 Scot. L. R. 383.

Decision of the United States Court of Appeals for the District of Columbia

The majority opinion of the Court of Appeals contains an accurate review of the facts, excerpts from Section 33 of the Longshoremen's Act, distinguishes the *only re-*

ported case cited in support of petitioner's main contention, and finally concludes:

> "The present case, however, is in conflict with the exception laid down in the Lowe case, since the running of the statute of limitations intervened, while the suit for damages was pending against the railway company. The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, *with the intervention of limitations,* bars his right to recover compensation under the statute."

The conclusion thus reached is in accord with the many decisions above cited in other jurisdictions where similar compensation laws are in force, while counsel for the petitioner, with all of his diligence and research, has cited only the one case on the main question, namely, *American Lumbermen's Co.* v. *Lowe,* 70 F. (2d) 616, and that case is really an authority in favor of the respondents, as above shown.

The learned Justice, who wrote the dissenting opinion, *does not cite a single authority* in support of his position; refers at length to the opinion in the third party action, which forms no part of the record in the present case, and reaches the erroneous conclusion that the respondent's right of subrogation has not been prejudiced, such view being directly opposed to the finding of the Deputy Commissioner, which should be binding on the courts. The learned Justice makes the mistake of attempting to determine *in this case* that an action against the third party could never have been prosecuted successfully. He overlooks the fact that the right of subrogation was prejudiced *at the outset* when the employee elected to sue the third party and deprived the employer of the right to try that action *with its own counsel in its own way.*

The dissenting Judge argues that, if the third party case should be retried now, the truck driver would not be avail-

able because of his death and the employee, therefore, could not hope to succeed. He overlooks the other side of the picture, namely, the fact that if the employee had elected to take compensation in the first place, the employer could have sued the third party promptly and the truck driver, who lived for a year or two after the accident, would have been available as a witness. The death of the truck driver furnishes an additional illustration of the manner in which the employer's subrogation right was prejudiced by the employee's election to sue the third party.

Petitioner's counsel devotes a page of his brief to an argument that the statute of limitations does not operate as a bar unless pleaded, but this Court takes judicial notice of the three-year statute applicable to the action against the third party and, by reason of the delay caused by the employee's election, the defense of the statute of limitations *became available* to the third party *tort feasor* and the employer's right of subrogation was thereby prejudiced.

Position of Deputy Commissioner Hoage.

This brief is filed by counsel for the insurance carrier, which petitioner's counsel correctly characterizes in his brief as the *real* party in interest, but petitioner may not infer therefrom that the other respondent, Deputy Commissioner Hoage, has receded in any way from the position taken in his finding of June 27, 1934 (R. 9-10). It appears to be customary, however, for the Deputy Commissioner, who is only a nominal party, to leave it to the real parties in interest to litigate their differences and secure a final determination thereof.

CONCLUSION.

The Supreme Court of the District of Columbia and the United States Court of Appeals for the District of Columbia were right in agreeing that the Deputy Commissioner's order of June 27, 1934 (R. 9-10), was "in accordance with law," under Sections 21 and 33 of the Compensation Act, such order having *rejected* the employee's claim for compensation (R. 10) because the employee, after electing to sue and after suing the third party for damages (R. 2), *voluntarily discontinued his suit* (R. 70), without the consent of the employer and over the protest of the insurance carrier (R. 14-15), *after the statute of limitations barred the institution of a new action against the third party,* the cause of action having arisen on December 15 1928, and the suit dismissed May 9, 1934, thereby prejudicing the employer's right of subrogation.

It is, therefore, respectfully submitted that the judgments of the two lower courts, sustaining the findings of the Deputy Commissioner, should be affirmed.

G. Bowdoin Craighill,
Frank H. Myers,
Attorneys for Respondent,
Indemnity Insurance Company of North America.